

ORIGINAL

Law Offices
Hill & Welch

EX PARTE OR LATE FILED

1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
Fax (202) 775-9026

November 8, 2002

RECEIVED

Jane E. Mago
General Counsel
Federal Communications Commission
Washington, D.C. 20554

NOV - 8 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYTimothy E. Welch
welchlaw@clark.netVictor L. Burford
(Engineering Consultant)
vburford@clark.netRe: Complaint Concerning Illegal *Ex Parte* Communication
MM Docket No. 98-112

Dear Ms. Mago:

Our office represents Preston W. Small in the referenced rule making proceeding which has been ongoing since July 1997. On October 18, 2002 the Commission published a *Public Notice*, which lists the filing of several petitions for reconsideration. One of the listed proceedings is "Amendment of the FM Table of Allotments (MM Docket No. 01-104, RM-10103, RM-10323, RM-10324) filed by Kevin F. Reed, Attorney for Cox Radio, Inc. and Mark N. Lipp, Attorney for Radio South, Inc. on 10/09/2002."

Sometime last week, after reviewing the October 18, 2002 *Public Notice*, undersigned counsel examined MM Docket No. 01-104 to determine the legal issues under review in that proceeding. To my surprise I found that the *Petition for Reconsideration* which Mr. Lipp filed in MM Docket 01-104 contains statements going to the merits of Mr. Small's pending reconsideration petition which we filed in MM Docket 98-112. Mr. Lipp represents WNNX LICO, Inc. in the proceeding with Mr. Small in MM Docket 98-112 and Mr. Lipp represents Radio South, Inc. in MM Docket 01-104. On August 16, 2000 Radio South, Inc. filed *Comments* opposing Mr. Small's request for relief in MM Docket 98-112 and Mr. Lipp's and RSI's *ex parte* comments in MM Docket 01-104 are not inadvertent. On October 30, 2002 I immediately filed a brief notice in MM Docket 98-112 so as to alert all of concern that something improper had occurred. The instant letter is being submitted in compliance with 47 C.F.R. § 1.1214.

A prohibited *ex parte* communication is one which is made to decision making Commission personnel which is directed to the "merits or outcome of a proceeding," but which is not served upon parties to the proceeding. 47 C.F.R. § 1.1202(a),(b),(c). 47 C.F.R. § 1.1208 provides that "proceedings involving amendments to the broadcast table of allotments," like MM Docket 98-112 and MM Docket 01-104, are "restricted" and *ex parte* communications are prohibited.¹

¹ RSI's *Petition* is a joint Petition with Cox Radio, Inc. and CXR Holdings, Inc. The circumstances under which ostensibly competing companies have come together to file a joint

No. of Copies rec'd (continued...) 0 + 1
List ABCDE

At pages 9-10 of the *Petition* filed in MM Docket No. 01-104 WNNX's counsel and RSI argue that "the filing of four petitions for reconsideration by Preston Small in the Anniston/College Park Proceeding constitutes a very unique abuse of the FCC processes." WNNX's counsel and RSI further argue that "to allow the filing of a fourth petition for reconsideration to thwart the provision of first local service to four new communities disserves [sic] the public and essentially elevates and condones this sort of behavior." In footnote 21 of the *Petition* WNNX's counsel and RSI argue that Mr. Small's *Petition for Reconsideration* filed in MM Docket 98-112 is "meritless" and that the Commission had changed its rules for the purpose of keeping Mr. Small's "meritless" petition from being filed. WNNX's counsel and RSI filed the *Petition* in MM Docket 01-104 without service upon the undersigned or Mr. Small and our names to not appear on the service list attached to the *Petition*.

These *ex parte* comments are clearly directed to the merits of Mr. Small's *Petition*. It is settled Commission law that even an expression of support for one side to a proceeding which is not served upon the opposing side constitutes an illegal *ex parte* presentation. *Rainbow Broadcasting Company*, 13 FCC Rcd. 21000 ¶ 14 (FCC 1998). WNNX's counsel's and RSI statements not only show support for WNNX's position in MM Docket No. 98-112, the comments are attacks against Mr. Small's very right to continue to participate in MM Docket 98-112. It cannot be disputed that WNNX's and RSI's shared counsel, Mr. Lipp, as the former chief of the Commission's section which was responsible for handling the amendment of FM table of allotments, is well aware of the prohibition on *ex parte* communications and of the penalty for violating that rule. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Vero Beach, Florida), Notice of Proposed Rule Making*, 3 FCC Rcd. 1632 ¶ 13 (Lipp, Chief, Policy and Rules Division 1988) (Mr. Lipp instructs the public that "any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding."). Mr. Lipp's representation of WNNX in MM Docket 98-112 has included multiple oppositions to Mr. Small's requests for relief and Mr. Lipp's opposition to Mr. Small as expressed in the *Petition* cannot be construed as "inadvertent."

It also cannot be disputed that RSI knows of the *ex parte* prohibition in the context of FM allocation proceedings. In *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. Macaon, Mississippi, Notice of Proposed Rule Making*, DA 01-348, ¶ 8, released February 9, 2001, RSI was instructed by the Commission that

(...continued)


Petition, and to jointly violate the Commission's *ex parte* rule and to injure Mr. Small, are unknown. Because it is counsel to WNNX and RSI which is common to both rulemaking proceedings, the focus of this letter is on Mr. Lipp, RSI and WNNX, however, the other petitioners are also at fault. Please note that today we are filing opposition comments in MM Docket 01-104 to put this matter into the record of that proceeding.

For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. . . . any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon any other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an ex parte presentation and shall not be considered in the proceeding.

Paragraph 6 of the *Notice of Proposed Rule Making*, DA 01-1093, released June 18, 2001, commencing the instant rulemaking proceeding, contains the same ex parte warning. RSI has previously opposed Mr. Small's efforts to upgrade his Milledgeville station and its ex parte comments cannot be excused as inadvertent. *See* RSI's August 16, 2000 *Comments on Petition for Reconsideration*, filed in MM Docket 98-112. Thus, RSI's opposition to Mr. Small as expressed in the *Petition* cannot be construed as "incidental."

It seems that in WNNX's counsel's and RSI's zeal to deny Mr. Small reconsideration tiling rights which every other party has and which many utilize, including RSI MM Docket 01-104, that they ignored the requirement that they are not permitted to argue against Mr. Small's pleadings in documents which are not served upon Mr. Small or his counsel. In an effort to paint Mr. Small in a bad light, WNNX's counsel and RSI engage in behavior which is specifically prohibited by clear rule. Mr. Small has clearly explained his position at every stage of MM Docket 98-112 and while counsel to WNNX and RSI apparently do not like the fact that Mr. Small is doing his best to protect his rights, neither counsel to WNNX nor RSI has any right to argue the merits of MM Docket 98-112 in another proceeding hidden from Mr. Small's view. The Commission should consider this flagrant breach of the ex parte rules in reaching a decision in MM Docket 98-112 and MM Docket 01-104. **As** discussed above, an appropriate penalty in a rulemaking proceeding for an ex parte violation is refusal to consider the offending document, that is, the Commission should dismiss the *Petition* and determine that Mr. Lipp and WNNX have forfeited their right to participate further in MM Docket 98-112.

Respectfully submitted,


Timothy E. Welch

cc: Mark N. Lipp
Kevin F. Reed